

**ITEM 10 (AUGUST MTG)
August XX, 2008**

ADVISORY OPINION 08-XX

Interpretation of Tenn. Code Ann. §§ 3-6-117
with regard to whether requests for informal
responses are confidential, and whether
the responses are public records.

INTRODUCTION

Matthew Hill, State Representative for the Seventh (7th) Legislative District, asks whether requests for informal responses from legal staff pursuant to Tenn. Code Ann. § 3-6-117 are confidential, and whether the informal responses themselves are public records.

QUESTIONS

1. Are oral statements made during an informal, telephone request for an informal response pursuant to Tenn. Code Ann. § 3-6-117 confidential?
2. Are records of inquiries and informal responses pursuant to Tenn. Code Ann. § 3-6-117 public records?

ANSWER

1. No. Oral statements made during an informal, telephone request for an informal response pursuant to Tenn. Code Ann. 3-6-117 are not confidential.
2. Yes. The informal responses pursuant to Tenn. Code Ann. § 3-6-117 are public records.

FACTS

In 2008, the Legislature passed several amendments to the Tennessee Ethics Reform Act of 2006 (“Act”) including Tenn. Code Ann. § 3-6-117 which provides that the executive director and attorneys employed by Tennessee Ethics Commission (“Commission”) are “authorized to give informal responses to any person subject to the jurisdiction of the commission...”

Tenn. Code Ann § 3-6-117 provides, in part:

The commission shall make and keep records of all inquires and all informal responses given, including the name and position of the person making the inquiry; the entity, if any, on behalf of which the inquiry is made; the date of the inquiry; the person responding to the inquiry; the precise inquiry; including the

facts and background information provided and the section or sections of statute involved; and the answer or response given.

In addition to making and keeping the records as directed above, the Commission is also required to compile the information gathered¹ and provide a copy of the compiled information to both the person who made the request and Commissioners.²

Shortly after the passage of this new section, Representative Hill inquired whether a request that he would like to make would be confidential. He also asked whether the informal response to such a request would be a public record. A Commission attorney responded that, in her opinion, there was no confidentiality provision for either the request or the response. The Commission received Representative Hill's request for an advisory opinion shortly thereafter.

ANALYSIS

1. Confidentiality of the request.

Almost all requests for informal responses come to Commission staff by telephone. In the event that the caller decides, during the conversation, not to proceed with his or her inquiry, no record is created. The absence of a record of the request does not, however, mean the substance of the request is confidential.³

Under Tennessee law, only two (2) entities other than the Commission are authorized to issue advisory opinions. Tenn. Code Ann. § 2-10-207(3) authorizes the Registry of Election Finance ("Registry") to issue advisory opinions. Such opinions are explicitly public, as they must be published on the registry's web site.⁴ The statute authorizing issuance of such opinions does not provide for confidentiality of the request.

The Office of the Attorney General ("AG") is also authorized to issue advisory opinions.⁵ However, that office, unlike the Registry and the Commission, is also charged by law with providing legal advice and representation to state officials and agencies.⁶ Thus the disclosure of a client's request for advice is governed by the attorney client privilege and the ethical rules that govern the conduct of attorneys.

The attorney client privilege is codified by statute in Tennessee. Tenn. Code Ann. § 23-3-105 codifies the attorney-client privilege in Tennessee. Pursuant to that privilege, no attorney "shall be permitted, in giving testimony against a client, or person who consulted the

¹ Tenn. Code Ann. § 3-6-117(b)(4).

² Tenn. Code Ann. § 3-6-117(b)(5).

³ The staff member could be subpoenaed to testify regarding the conversation.

⁴ Tenn. Code Ann. § 2-10-207(3).

⁵ Tenn. Code Ann. § 8-6-109(b)(6).

⁶ Tenn. Code Ann. §§ 8-6-109(b)(5), 8-6-301.

attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.”⁷ Although the privilege does not protect against disclosure of all client statements, it does prevent disclosure of a client’s request that may “reveal, directly or by implication, matters that the client desires should remain confidential.”⁸

If the request results in the issuance of an opinion, and if the opinion reveals everything there is to reveal about the request, there may be no confidentiality left to protect.⁹ However, if a client who requests an Attorney General opinion withdraws the request and prevents the issuance of an opinion, the Attorney General is authorized, indeed required, to preserve any client confidences included in the request.

The Ethics Commission is not charged to provide legal representation to anyone. Therefore, in the absence of a specific statutory confidentiality provision, the Commission is not authorized to treat requests for informal responses or advisory opinions confidentially.

2. Confidentiality of informal response

When an oral request is made, and not withdrawn during the initial conversation, then a record of the request, and of the response, is made as required by the law cited above. These records come within the definition of “public record” contained in the Public Records Act. The Act defines “public record” as follows:

As used in this part and Title 8, Chapter 4, Part 6, "public record or records" or "state record or records" means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.¹⁰

The Act provides that all “public records” shall be available for inspection by citizens of Tennessee.

All state, county and municipal records shall at all times, during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of

⁷ Tenn. Code Ann. § 23-3-105.

⁸ *Combined Communications, Inc. v. Solid Waste Region Board*, 1994 WL 123831 (Tenn. Ct. App., April 13, 1994) (Cantrell, J.). See also Rule 1.6, Tennessee Rules of Professional Conduct.

⁹ Attorney General opinions are public record. Tenn. Code Ann. §§ 8-6-109(b)(6) (“Written opinions . . . shall be made available for public inspection”), 8-6-205(a) (Requiring the AG to publish all official opinions.)

¹⁰ Tenn. Code Ann. § 10-7-503(a)(1).

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Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.¹¹

The Public Records Act itself contains a number of confidentiality provisions, but none of them apply to records of informal responses issued by legal staff of the Ethics Commission. Nor does the Ethics Reform Act contain any provision that records of informal responses are confidential. A brief survey of legislative history and debate associated with Tenn. Code Ann. § 3-6-117 finds no discussion indicating that the legislature considered making the informal responses confidential. The absence of such a confidentiality provision in the Act is in stark contrast to the explicit provision for confidentiality of records of proceedings relating to confidential complaints. Tenn. Code Ann. § 3-6-202.

That the legislature did not discuss making the records of informal responses confidential is important within the context of the Act. The Act, considered as a whole, emphasizes disclosure to the public and, in fact, generally mandates public disclosure unless confidentiality is specifically and explicitly mandated by statute.¹² A finding that Tenn. Code Ann. § 3-6-117 allowed for confidential inquiries and responses would run counter to both the specific and general provisions of the Act unless such a confidentiality provision were explicitly provided for within Tenn. Code Ann. § 3-6-117.

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¹¹Tenn. Code Ann. § 10-7-503(a)(2)(A).

¹² Tenn. Code Ann. § 3-6-106(a)(6)(Providing the Commission must, “[m]ake as many documents filed available for viewing on the Internet as is reasonable based on the commission's financial resources, and make each document filed available for public inspection and copying during regular office hours at the expense of any person requesting copies of the documents; provided, that this subdivision (a)(4) does not apply to those documents required to be confidential pursuant to § 3-6-202.”); Tenn. Code Ann. § 3-6-106(a)(7)(Providing the Commission must “[p]repare and publish on the commission's web site reports as are deemed to be appropriate and in the public interest by the commission, including quarterly reports listing alphabetically all registered lobbyists and employers of lobbyists, as defined in part 3 of this chapter.”).